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No. 94 464

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

NORFOLK SOUTHERN RAILWAY COMPANY,
Petitioner

v.

THE NORTH CAROLINA RAILROAD COMPANY,
Respondent

Petition For A Writ Of Certiorari
To The Court Of Appeals
Of North Carolina

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Do the Interstate Commerce Act, and abandonment decisions of the Interstate Commerce Commission thereunder, preempt and preclude a state court's jurisdiction to determine where and whether the rail line of an interstate rail carrier must connect with the line of another railroad, if abandonment permitted by the Commission has severed a connection that may have previously existed between the lines?

PARTIES TO THE PROCEEDINGS IN THE COURT OF APPEALS OF NORTH CAROLINA

North Carolina Railroad Company

City of Charlotte, North Carolina

Norfolk Southern Railway Company

Norfolk Southern Railway Company's parent corporation is Norfolk Southern Corporation.

Norfolk Southern Railway Company's non-wholly-owned subsidiaries are:

High Point, Randleman, Asheboro and Southern Railroad Company

Mobile and Birmingham Railroad Company

Norfolk and Portsmouth Belt Line Railroad Company

The North Carolina Midland Railroad Company

The South Western Rail Road Company

State University Railroad Company

Yadkin Railroad Company

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No.

NORFOLK SOUTHERN RAILWAY COMPANY,
PETITIONER

v.

THE NORTH CAROLINA RAILROAD COMPANY,
RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF NORTH CAROLINA

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF NORTH CAROLINA

Petitioner Norfolk Southern Railway Company respectfully submits this Petition for a Writ of Certiorari to review the opinion and judgment of the Court of Appeals of North Carolina.

OPINIONS BELOW

The opinion of the North Carolina Court of Appeals is reported at 112 N.C. App. 762, 437 S.E.2d 393 (1993). The order of the North Carolina Supreme Court dismissing petitioner's appeal and denying discretionary review is reported at 336 N.C. 608, — S.E.2d — (1994). It is final.

BASIS FOR JURISDICTION

The order of the North Carolina Supreme Court dismissing petitioner's appeal and denying its petition for discretionary review was entered June 16, 1994. The opinion and judgment of the North Carolina Court of Appeals from which review is sought was entered December 7, 1993. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The constitutional provisions involved are the Interstate Commerce Clause, art. I, § 8, cl. 3:

> [Congress shall have the Power] To regulate Commerce . . . among the several States . . .;

and the Supremacy Clause, art. VI, cl. 2:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land;

> and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

The statutory provisions involved are the Interstate Commerce Act, of which the pertinent statutes are 49 U.S.C. §§ 10501 and 10903, set out in relevant part at App. 35a-38a.

STATEMENT OF THE CASE

In 1991 petitioner filed with the Interstate Commerce Commission (the "Commission") a Notice of Exemption for abandonment of a 0.13-mile section of disused rail line in downtown Charlotte, North Carolina. The abandoned section lay at the northern terminus of a rail line owned by petitioner. Proceeding northward from petitioner's terminus, tracks crossed Second Street. From Second Street, respondent owns a rail line that extends northeast across the state of North Carolina. The abandonment severed an earlier track connection between the two lines; petitioner's line still connects with respondent's line north of Charlotte.[1] App. 25a.

On July 16, 1991, the Commission ordered that the abandonment would be effective August 30, 1991. The abandoned section ran across a tract of land owned in fee by petitioner. In conjunction with the abandonment, and as part of an agreement with the City of Charlotte, petitioner deeded the tract of land to the City.

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[1] Respondent's entire railroad line was leased to petitioner under a 99-year lease that will expire on December 31, 1994. At present, petitioner conducts all rail operations on respondent's line, and respondent conducts no rail operations.

Respondent filed a petition to reopen the Commission's proceeding and revoke the abandonment on December 10, 1991. On the same day, respondent commenced this action by filing a complaint in the Superior Court of Mecklenburg County, North Carolina. The complaint sought a declaration of the parties' rights and obligations with respect to the tract that petitioner had conveyed to the City, and also with respect to petitioner's line of railroad generally. Respondent asked the state court to declare: That respondent had express or implied contracts with petitioner and the City to maintain a "continuous through track connection"[2] between respondent's line and petitioner's line; that the tract of land petitioner had conveyed to the City was subject to express, implied or equitable easements in respondent's favor; and that respondent was a third-party beneficiary of the contract for sale of the tract of land by petitioner to the City. App. 29a-30a.

On February 18, 1992, the Commission denied respondent's petition to reopen the abandonment proceeding or revoke the abandonment. The Commission found that petitioner "did not obligate itself to connect with respondent

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[2] This phrase, which appears in a 1968 lease agreement and accompanying Memorandum of Lease between the parties, is the sole basis for respondent's assertion that petitioner has an express obligation to connect its line with respondent's line. The parties vigorously disagree about the proper interpretation of this phrase. Although it is outside the scope of the present petition to seek proper construction of the phrase, it is instructive that the Commission did construe the phrase, and found that petitioner had *not* thereby obligated itself to connect with respondent's track.

or to maintain a right-of-way." App. 24a. Respondent did not appeal the Commission's decision to the federal Court of Appeals under the procedure provided in 28 U.S.C. § 2321(a).

On May 4, 1992, the Mecklenburg County Superior Court heard all motions pending in the state-court action at that time. In an order dated May 19, 1992, the court denied petitioner's motion to dismiss for lack of subject-matter jurisdiction, and denied petitioner's motions to dismiss the action for failure to state a claim on which relief could be granted. The court granted petitioner's motions for summary judgment on respondent's requests for declarations of express contract and express easement, but denied summary judgment against respondent with respect to its claims of an "easement implied by reservation," an "equitable servitude in the nature of a railroad right of way," and implied contracts to maintain a railroad connection or corridor. App. 12a-15a.

Petitioner appealed the trial court's denial of its motion for dismissal for lack of subject-matter jurisdiction to the North Carolina Court of Appeals. In an opinion dated December 7, 1993, the Court of Appeals affirmed the Superior Court's denial of petitioner's motion for dismissal. App. 3a-11a. Petitioner then filed a notice of appeal and petition for discretionary review with the Supreme Court of North Carolina. The North Carolina Supreme Court, by an order entered June 16, 1994, dismissed petitioner's appeal and denied its petition for discretionary review. App. 1a-2a.

How the Federal Question Was Raised: At the motions session of Mecklenburg County Superior Court, which was the sole trial-court proceeding in this case, petitioner raised the issues of preemption and res judicata or

collateral estoppel as bases for dismissal for lack of subject-matter jurisdiction. App. 32a-34a. This motion was denied by the Superior Court. App. 14a. Petitioner again asserted the preemption and res judicata or collateral estoppel issues as Assignments of Error in the Record on Appeal to the North Carolina Court of Appeals, and argued these assertions in its Defendant-Appellant's Brief to that court. The North Carolina Court of Appeals acknowledged petitioner's arguments that the trial court improperly assumed jurisdiction, in view of the Commission's preemption of state authority to dictate the trackage or service obligations of an interstate rail carrier. The Court of Appeals held, however, that the case below "turn[ed] on state law construction of written instruments ... while the I.C.C. ruling applie[d] to the abandonment of the railroad." App. 8a-9a. The court did not explain the basis for its distinction. Petitioner again raised the preemption and preclusion issues in its Notice of Appeal and Petition for Discretionary Review to the North Carolina Supreme Court.

REASONS FOR ALLOWING THE WRIT

The decision of the North Carolina Court of Appeals, if not corrected by this Court, will result in State-supported violation of the Interstate Commerce and Supremacy Clauses of the United States Constitution. Under this decision, an interstate rail carrier could pursue and receive authorization from the Interstate Commerce Commission to abandon a line of railroad, yet still be subject to a putative duty under state law to maintain a track connection for the benefit of a state-court claimant. The decision directly conflicts with the well-established case law of this Court, and in particular with the ruling law stated in *Chicago and North Western Transportation Co. v. Kalo Brick & Tile Co.*, 450 U.S. 311

(1981). If allowed to stand, North Carolina and other States will feel free to ignore Commission orders on the pretext that state law of contracts and property permits independent state-law jurisdiction over railroad matters that have always been held to be within the Commission's exclusive jurisdiction.

In *Kalo*, an interstate rail carrier had been granted Commission approval for its abandonment of a branch line. The single shipper served by the branch line filed a complaint in Iowa state court, seeking damages under state law for the railroad's refusal to provide service and track maintenance on the abandoned line. The trial court dismissed the claim as preempted by the Interstate Commerce Act, but the Iowa Court of Appeals reversed. That court held that federal and state law did not conflict with each other, but rather complemented each other in providing relief for parties allegedly affected by abandonments. The Iowa Supreme Court denied review, and this Court granted certiorari.

Reversing the Iowa Court of Appeals, this Court held in *Kalo* that the Interstate Commerce Act and Iowa law were in fundamental conflict with respect to subject matter over which Congress had given the Commission exclusive jurisdiction. The Commission has "plenary authority to regulate, in the interest of interstate commerce, rail carriers' cessations of service on their lines. And at least as to abandonments, this authority is exclusive." 450 U.S. at 323. Such authority must preempt any state-court holding, like that of the Iowa Court of Appeals in *Kalo*, that claims for failure to maintain track and right of way on a line abandoned with Commission approval are "properly cognizable in the state courts." 450 U.S. at 324.

In the present case, respondent's complaint demands that North Carolina's state courts declare that petitioner has a contractual obligation to maintain a "continuous through track connection between NCRR's line and NS' line." Since the abandoned section had connected with tracks that continued onto respondent's right of way,[3] any declaration purporting to impose a duty to connect track or right of way would require that petitioner maintain track and railroad right of way precisely where the Commission had approved abandonment.

The North Carolina Court of Appeals purported to find a distinction between "state law construction of written instruments" and Commission authority for "abandonment of the railroad." App. 8a-9a. As this Court emphasized in *Kalo*, however, federal preemption is not subject to defeat by immaterial distinctions:

> It is true that not one of the three counts of respondent's state-court complaint mentions the word "abandonment," but compliance with the intent of Congress cannot be avoided by mere artful pleading. It is difficult to escape the conclusion that the instant litigation represents little more than an attempt by a

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[3] The parties dispute the location of respondent's southern terminus. Respondent contends it lies on the southern margin of Second Street, and thus was coterminous with petitioner's pre-abandonment northern terminus; petitioner contends that respondent's southern terminus is on the northern margin of Second Street. The distinction is not relevant for the present purposes, because it is not disputed that tracks that previously crossed Second Street connected the parties' rights of way.

> disappointed shipper to gain from the Iowa courts the relief it was denied by the Commission.

450 U.S. at 324. In the present case, it is difficult to avoid the conclusion that respondent retained petitioner as a party in the state-court litigation in an attempt to have the North Carolina courts undo the Commission's authorization for petitioner's abandonment of its former track in Charlotte.

It is immaterial, moreover, that the present action is one for declaratory relief, rather than damages as in *Kalo*. It is proper for this Court to review state-court declaratory judgment actions when the state courts incorrectly decide, or fail to consider, the issue of federal preemption. *Franchise Tax Board of the State of California v. Construction Laborers Vacation Trust for Southern California*, 463 U.S. 1, 12 n.12 (1983); *Alabama State Federation of Labor v. McAdory*, 325 U.S. 450, 471 (1945).

At no stage of the proceedings below has respondent specified how the relief it seeks can be ordered without requiring petitioner to do what the Commission has excused petitioner from doing. In fact, respondent's demand that an interstate rail carrier provide "a continuous through track connection" with petitioner necessarily implicates the duty to provide a track connection between the two railroads at some point. The North Carolina courts' acceptance of jurisdiction to declare rights of access over petitioner's rail line to all points on the line, and to all further connections the line may reach, amounts to usurpation of exclusive Commission jurisdiction.

This Court's protection of Commission jurisdiction has a history almost as long as the history of the Interstate Commerce Act itself. *Kalo*, 450 U.S. at 318. In *Illinois Central Railroad Co. v. De Fuentes*, 236 U.S. 157 (1915), Louisiana's state railroad commission had issued an order requiring all railroad companies operating in that state to switch cars with any connecting railroad. This Court noted that "physical connections exist between appellant's tracks and the lines of competitive railroads leading therefrom to many states; if [the order] is enforced, its switch tracks will be subjected to use by such railroads. . . ." 236 U.S. at 162. This Court held that Louisiana had exceeded its powers, because it was attempting to regulate a subject preempted by Congress.

In *Alabama & Vicksburg Railway Co. v. Jackson & Eastern Railway Co.*, 271 U.S. 244 (1926), Jackson & Eastern sought to connect with Alabama & Vicksburg, an interstate railroad, by means of a state eminent domain proceeding. Jackson & Eastern did not have Commission approval for the connection. This Court held:

> [T]he establishment of junctions between the main lines of independent carriers is commonly connected with the establishment of through routes and the interchange of car services, and is often but a step toward the joint use of tracks. Over all of these matters the Commission has exclusive jurisdiction.

271 U.S. at 250. This Court held that Mississippi's Supreme Court had erred in concluding the Commission lacked exclusive jurisdiction over junctions between interstate railroads, or that Mississippi's presumption of power to

govern such junctions did not unduly burden interstate commerce.

Respondent has persistently asserted that the obligations it seeks to impose on petitioner are wholly outside the scope of Commission regulation. As this Court has recognized, Commission authority over a carrier's right of way diminishes or ceases after abandonment, and carriers might have post-abandonment contractual obligations and property rights that are justiciable as matters of ordinary contract and property law. This Court has never suggested that the state courts could use such matters as the bases for exercise of parallel jurisdiction with the Commission, much less an excuse effectively to reverse an abandonment authorized by the Commission.

In *Central New England Railway Co. v. Boston & Albany Railroad Co.*, 279 U.S. 415 (1929), the owner of a branch line had a contract with another railroad for operation over the second railroad's line. The first railroad was obligated to pay $15,000 per year for the operating rights. After the first railroad abandoned its branch line with Commission approval, it discontinued payments to the second railroad. The second railroad sued in state court to recover payments due it. The first railroad contended that abandonment necessitated and excused its discontinuance of payments. This Court held that the Commission's abandonment order did not purport to relieve the first railroad of its contractual obligations to make annual payments.

In a more recent opinion, the Court held that the Interstate Commerce Act does not preempt state jurisdiction over rail property after the Commission has authorized abandonment. In *Hayfield Northern Railroad Co., Inc. v.*

Chicago and North Western Transportation Co., 467 U.S. 622 (1984), a carrier had completed abandonment of a section of its interstate rail line. A group of shippers then created a railroad company and exercised the power of eminent domain under Minnesota law for the segment of abandoned line within that state. The Court held that the abandoned line did not remain under the Commission's jurisdiction after abandonment; therefore, the railroad's abandoned right of way and track could properly be subject to taking under a state condemnation proceeding.

In the present case, petitioner had no alleged contractual obligation to respondent that could be imposed independent of the duty respondent alleges to provide a connection between petitioner's line and respondent's line. Nor has petitioner attempted to interpose any objection to respondent's exercising rights it asserts over the abandoned section. Petitioner has conveyed to the City of Charlotte fee title to the land that once underlay petitoner's rail line, and any rights respondent may wish to assert respecting that property must be asserted against the City or its successor in title.

Respondent goes far beyond such assertions, however, in insisting that petitioner is subject to state-court jurisdiction to declare petitioner's obligation to provide a connection between its line and respondent's line at this location. Respondent's demand for a connection between lines means a court must order that (1) the parties' lines must connect somewhere, and (2) such a connection must be located so as to provide respondent with a rail corridor proceeding south

from the southern terminus of respondent's line.[4] If North Carolina courts were free to mandate track connection as respondent has demanded, those courts would have the power to undo an abandonment approved by the Commission under 49 U.S.C. § 10903, by declaring that petitioner must restore its rail line in the abandoned section. Alternatively, if a state court could declare that respondent had the right to extend its own rail line into the abandoned section, the court would be usurping the Commission's exclusive authority to approve a carrier's acquisition, construction or operation of additional or extended rail line. 49 U.S.C. § 10901(a). The North Carolina courts are clearly preempted from any such determinations, because "when Congress has established an exclusive form of regulation, 'there can be no divided authority over interstate commerce.'" *Arkansas Louisiana Gas Co. v. Hall*, 453 U.S. 571, 580 (1981), *quoting Missouri Pacific Railroad Co. v. Stroud*, 267 U.S. 404, 408 (1925).

The North Carolina courts are not only preempted; they are also precluded from entertaining litigation about whether petitioner must connect its rail line with respondent's. In *Kalo*, this Court noted that the Commission's abandonment approval "bolstered" the conclusion that federal law preempts state law in the area. 450 U.S. at 326. In *Kalo*, the aggrieved shipper filed suit in state court before the Commission issued its abandonment order. This Court stated:

> Even though the approval did not come until after respondent filed its civil suit, it would be

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[4] As observed by the Commission, NCRR'S line *does* connect with NS's line. This connection is located north of Charlotte. App. 25a.

> contrary to the language of the statute to permit litigation challenging the lawfulness of the carrier's actions to go forward when the Commission has expressly found them to be reasonable.

Id. In the present case, the Commission issued two orders: the first order, based on petitioner's Notice of Exemption, was issued before respondent sued petitioner in state court. The Commission's second order, its decision in response to respondent's petition to reopen Commission proceedings on the abandonment, was issued during the pleadings phase of the state-court action.[5] In the latter decision, the Commission expressly construed the "continuous through track connection" language that respondent relies on, and found that respondent had misconstrued the term:

> We find also that neither NS nor the City assumed any obligation under the terms of the Memorandum of Lease, to maintain a connection with NCRR over the abandoned line. Our reading of the memorandum shows that it deals only with NCRR property and that

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[5] The Commission's decision, entered February 18, 1992, was to become effective February 24, 1992. App. 25a. Both dates were after petitioner was required to, and did, file its answer in state court to respondent's complaint. Petitioner moved to amend its answer to incorporate reference to the Commission's February 18, 1992 decision with respect to res judicata or collateral estoppel, but the trial court denied the motion. App. 14a.

> NS was only obligated to determine a point of connection for a right-of-way so that NCRR could connect with NS. NS did not obligate itself to connect with NCRR or to maintain a right-of-way. NCRR's misinterpretation of the Memorandum of Lease does not provide a basis for establishing changed circumstances to reopen the proceeding.

App. 24a. The Commission found there was no reason to revoke the exemption, and in effect reaffirmed the abandonment over respondent's objection.

Now respondent seeks a state-court declaration that petitioner must provide a connection at the very place where the Commission has authorized abandonment, and for the same reasons rejected by the Commission in its second decision. In *Kalo*, this Court held that the Commission's findings "simply leave no room for further litigation over the matters respondent seeks to raise in state court." 450 U.S. at 327. This was despite the aggrieved shipper's failure to perfect its objection to abandonment before the Commission. In the present case, respondent's post-abandonment petition to reopen or revoke the abandonment actually was considered by the Commission and explicitly rejected. Thus, even more fully than the aggrieved party in *Kalo*, respondent was able to present its case for non-abandonment to the Commission, and to enjoy the adjudicatory consideration which supports application of the doctrine of res judicata. The Commission's decision "simply leave[s] no room for further litigation" over respondent's demand for a track connection between its line and petitioner's line.

On the face of its complaint, respondent imputes to the North Carolina state courts jurisdiction to declare that petitioner must connect its interstate rail line with respondent's line, and more generally to declare respondent's "right, title and interest in . . . the Norfolk Southern railroad line" — a line respondent knowingly identifies as "an interstate railroad line." App. 31a, 27a. The North Carolina courts have erred in asserting such jurisdiction. It is important that this Court grant petitioner's petition for certiorari, because the potential effects of continuing state-court jurisdiction are at best confusion, and at worst subversion of the principle of supremacy of federal law in interstate commerce.

It is well established that a state court may not prescribe interstate rail connections, even if the affected sections of rail line lie completely within the state. *Colorado v. United States*, 271 U.S. 153 (1926). There is nothing in the North Carolina Court of Appeals' cursory analysis of the preemption issue in this case, however, to suggest any restraint on a state court's authority to declare rights and duties of railroads to connect with each other. If, in this case, the abandoned section of rail line had crossed the line between North Carolina and South Carolina, nothing in the law of this case so far would prevent North Carolina jurisdiction from pursuing the connection into South Carolina, there perhaps to conflict with the jurisdiction of that State's courts. It was precisely to avoid such inherent conflicts that the Constitution vested the power to regulate interstate commerce in the federal government. Since the creation of the Interstate Commerce Commission, such conflicts have consistently been avoided in practice by this Court's recognition of the Commission's exclusive and preemptive

authority in matters of rail line abandonments and connections.

The Constitution simply does not permit a state court to require that an interstate rail carrier provide a connection to reattach rail line that has been severed as the result of an abandonment approved by the Commission. Petitioner respectfully submits that it is essential that this Court grant certiorari to prevent such an improper assumption of jurisdiction.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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September 13, 1994

APPENDIX

APPENDIX A

SUPREME COURT OF NORTH CAROLINA

No. 29P94

THE NORTH CAROLINA RAILROAD COMPANY,

v.

CITY OF CHARLOTTE and
NORFOLK SOUTHERN RAILWAY COMPANY,

Appeal from the Court of Appeals of North Carolina

June 16, 1994

ORDER

Upon consideration of the notice of appeal from the North Carolina Court of Appeals, filed by the Defendant (Norfolk Southern Railway) in this matter pursuant to G.S. 7A-30, and the motion to dismiss the appeal for lack of substantial constitutional question filed by the Plaintiff, the following order was entered and is hereby certified to the North Carolina Court of Appeals: the motion to dismiss the appeal is

"Allowed by order of the Court in conference, this the 16th day of June 1994.

s/ Parker, J.
For the Court"

Upon consideration of the petition filed by Defendant (Norfolk Southern Railway) in this matter for discretionary review of the decision of the North Carolina Court of Appeals pursuant to G.S. 7A-31, the following order was entered and is hereby certified to the North Carolina Court of Appeals:

"Denied by order of the Court in conference, this the 16th day of June 1994.

s/ Parker, J.
For the Court"

APPENDIX B

COURT OF APPEALS OF NORTH CAROLINA

No. 9226SC916

THE NORTH CAROLINA RAILROAD COMPANY,
Plaintiff,

v.

CITY OF CHARLOTTE and
NORFOLK SOUTHERN RAILWAY COMPANY,
Defendants

Appeal from the Superior Court of Mecklenburg County

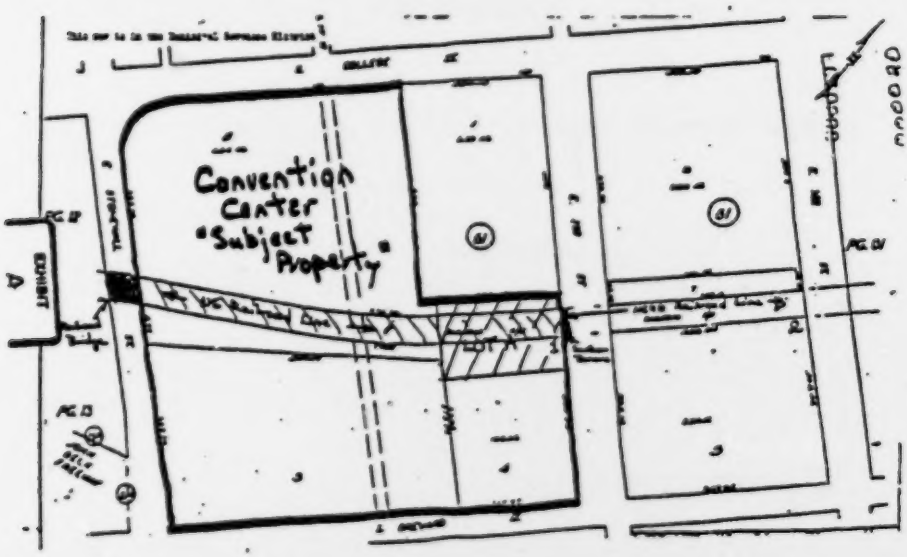
December 7, 1993

JOHNSON, Judge.

This action centers around a right of way dispute between two railroad companies, The North Carolina Railroad Company (NCRR) and Norfolk Southern Railway Company

(NS[1]), as to a tract of land in downtown Charlotte, North Carolina. The facts pertinent to this appeal are as follows:

NCRR owns a railroad line which runs across North Carolina, from Morehead City westward to a southern terminus point in downtown Charlotte. At this southern terminus point, NCRR's railroad line is connected and has connected to the railroad line and corridor owned by NS since the turn of the century. NS' line continues south from that point through the remainder of Charlotte and to points beyond as an interstate railroad line. These two lines connected on a small parcel of land (Lot A) owned jointly by NCRR and NS as tenants in common on the south side of Second Street in downtown Charlotte. Lot A bordered a larger tract of land owned by NS (this larger tract is referred to as the Subject Property). NS' right of way extends southward from Lot A, through the Subject Property.



[1]NS refers to both Norfolk Southern and its predecessor, Southern Railway.

In a document executed in 1895, NCRR leased certain properties to NS for a ninety-nine year period (until 1994). In 1968, the parties executed a new lease agreement pertaining to several of the parcels covered in the 1895 agreement located north of the Subject Property and Lot A. This new lease contained an exception of a forty-foot strip as a right of way for two railroad tracks, and pursuant to the terms of the exception, NS had a surveyor locate this forty-foot strip and it was recorded in the Mecklenburg Registry on 23 December 1971 on a plat entitled "Southern Railway Right of Way."

By the terms of the 1968 lease, NCRR conveyed all of its undivided interest in Lot A to NS by general warranty deed without reservation or condition.

In 1990, NS and the City of Charlotte (City) entered into an agreement for NS to sell the Subject Property to the City as the City planned to build a convention center on the Subject Property. In 1991, the parties amended their agreement to provide that NS seek Interstate Commerce Commission (ICC) approval for abandonment of its line of railroad on the Subject Property. NS filed this notice with the ICC; the ICC responded affirmatively on 16 July 1991, stating the exemption would become effective 30 August 1991.

As a result of this decision, NCRR filed a petition with the ICC, dated 10 December 1991, asking the ICC to reopen consideration of its decision allowing NS to abandon the rail line on the Subject Property. NS filed timely response opposing this petition, and the ICC rendered its decision on 18 February 1992, effective 24 February 1992, denying NCRR's petition.

Also on 10 December 1991, plaintiff NCRR filed a complaint for declaratory judgment in this action in Mecklenburg County Superior Court and served defendants NS and City on 11 December 1991. NS obtained an extension of time to respond, and then filed and served its answer and counterclaim; the City also filed its answer. NS' and the City's answers included motions to dismiss under N.C.R. Civ. P. 12(b)(1) and 12(b)(6).

NS filed a motion for summary judgment against NCRR on 2 March 1992. NCRR filed a motion to dismiss NS' counterclaim under N.C.R. Civ. P. 12(b)(6) on 9 March 1992. City filed a motion for judgment on the pleadings under N.C.R. Civ. P. 12(c) and for summary judgment against NCRR on 22 April 1992.

On 22 April 1992, NS filed a motion for leave to amend its answer and counterclaim, to allege the affirmative defenses of res judicata and/or collateral estoppel.

On 4 May 1992, during the motions session of the action, NS contended in open court that the ICC had exclusive subject matter jurisdiction over the NCRR's claims against NS. A motion by NCRR to stay the hearing pending completion of discovery was denied.

The order entered on 19 May 1992 contained the following rulings: a denial of the City's motion for judgment on the pleadings; a denial of NS' motion to dismiss for lack of subject matter jurisdiction; a denial of NS' and the City's motions to dismiss for failure to state a claim under N.C.R. Civ. P. 12(b)(6); a denial of NS' and the City's motions for summary judgment as to counts 1, 3, 6 and 7 of the complaint; the granting of NS' and the City's motions for

summary judgment as to counts 2, 4, 5 and 8 of the complaint; a denial of NCRR's motion to dismiss NS' counterclaim under N.C.R. Civ. P. 12(b)(6); and a denial of NCRR's motion for leave to amend its answer and counterclaim to allege res judicata and/or collateral estoppel.

NS filed notice of appeal on 26 June 1992, and NCRR filed its notice of cross-appeal on 9 July 1992.

NS first assigns that the trial court erred in denying NS' motion to dismiss for lack of subject matter jurisdiction. NS argues initially that this interlocutory appeal is proper under North Carolina General Statutes 1-277 (1983). This statute states:

> (a) An appeal may be taken from every judicial order or determination of a judge of a superior or district court, upon or involving a matter of law or legal inference, whether made in or out of session, which affects a substantial right claimed in any action or proceeding; or which in effect determines the action, and prevents a judgment from which an appeal might be taken; or discontinues the action, or grants or refuses a new trial.
>
> (b) Any interested party shall have the right of immediate appeal from an adverse ruling as to the jurisdiction of the court over the person or property of the defendant or such party may preserve his exception for determination upon any subsequent appeal in the cause.

NS argues that the trial court improperly assumed jurisdiction over property of NS, and that "[u]nder N.C.G.S. 1-277(b), it is clearly proper for this Court to consider an appeal from denial of a motion to dismiss, when the motion deals with jurisdiction over property of the appellant." NS further argues that "[t]he trial court's decision also affects a substantial right of NS: the right not to be forced to go to trial when jurisdiction assumed over NS in state court was a nullity. Therefore, immediate appeal is also proper under N.C.G.S. 1-277(a)."

Our Court has stated that "[North Carolina General Statutes 1-277(b)] simply allows a defendant, in an action of this nature, a means of immediate appellate determination as to whether the trial court has jurisdiction so that it can then proceed to answer the questions raised by the lawsuit." Holt v. Holt, 41 N.C. App. 344, 348, 255 S.E.2d 407, 410 (1979). We find that the denial of NS' motion to dismiss for lack of subject matter jurisdiction is properly appealable.

NS argues that "[t]he court below erroneously assumed jurisdiction over NS's property south of the Subject Property. . . . NS's duty to provide interstate rail service on its lines is subject to exclusive jurisdiction of the ICC." NS argues that it is well-established "that the ICC's authority to regulate trackage rights affecting interstate commerce preempts state regulation." NS directs this Court's attention to cases specifically involving claims which involve state jurisdiction over physical joining of lines, use of an interstate trackage and abandonment of existing lines.

The cases which NS cites, however, are distinguishable from the facts in the instant case. The instant case turns on state law construction of written instruments,

specifically the language of the 1968 lease, the 1968 deed and the 1990 contract herein, while the I.C.C. ruling applies to the abandonment of the railroad. We therefore find that the trial court did not err in denying NS' motion to dismiss for lack of subject matter jurisdiction.

NS' next two assignments of error are that (1) the trial court abused its discretion in denying NS leave to amend its answer and counterclaim as to the preclusive effect of the ICC decision, and (2) the trial court erred in denying NS' motion to dismiss pursuant to N.C.R. Civ. P. 12(b)(6), because the ICC's decision of 18 February 1992 precludes state court determination of the claims raised in the complaint against NS. For reasons set out in our previous discussion, we need not address these assignments of error.

NCRR cross-appeals and argues that the trial court erred by granting defendant NS' motions for summary judgment on counts 2, 4, 5, and 8 of the complaint. In determining whether we may properly hear NCRR's cross-appeal, we turn to N.C.R. Civ. P. 54(b):

> *Judgment upon multiple claims or involving multiple parties.* — When more than one claim for relief is presented in an action, whether as a claim, counterclaim, crossclaim, or third-party claim, or when multiple parties are involved, the court may enter a final judgment as to one or more but fewer than all of the claims or parties only if there is no just reason for delay and it is so determined in the judgment. Such judgment shall then be subject to review by appeal or as otherwise provided by these rules or other statutes. *In*

> *the absence of entry of such a final judgment, any order or other form of decision, however designated, which adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties shall not terminate the action as to any of the claims or parties and shall not then be subject to review either by appeal or otherwise except as expressly provided by these rules or other statutes.* Similarly, in the absence of entry of such a final judgment, any order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties. (Emphasis added.)

In order for a judgment in a multiple claim or multiple party action to be immediately appealable, the judgment must be (1) in effect final as to one or more of the claims or parties; and (2) certified for appeal by the trial judge. If the judgment is final as to one or more of the claims or parties but has not been certified for appeal by the trial court, no appeal will lie unless an immediate appeal is authorized by some other rule or statute, such as North Carolina General Statutes 1-277 or North Carolina General Statutes 7A-27 (1989). Leasing Corp. v. Myers, 46 N.C. App. 162, 265 S.E.2d 240, disc. review allowed and appeal dismissed, 301 N.C. 92 (1980).

Therefore, the judgment herein, as a multiple claim or multiple party action, and final as to one or more of the claims or parties but not certified for appeal by the trial court, is not appealable unless an immediate appeal is authorized by some other rule or statute. Finding no immediate appeal

authorized by some other rule or statute, and noting that counts 1, 3, 6 and 7 of NCRR's complaint remain, we find NCRR's cross-appeal interlocutory.

We affirm the trial court's decision denying NS' motion to dismiss for lack of subject matter jurisdiction. We dismiss NCRR's cross-appeal as it is interlocutory.

Judges WYNN and JOHN concur.

APPENDIX C

STATE OF NORTH CAROLINA
COUNTY OF MECKLENBURG

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
91 CvS 17226

THE NORTH CAROLINA RAILROAD COMPANY,
Plaintiff,

v.

CITY OF CHARLOTTE and NORFOLK
SOUTHERN RAILWAY COMPANY,
Defendants.

Filed May 29, 1992

ORDER

This cause came on before the Honorable Claude S. Sitton on May 4, 1992 for hearing on: motions of Defendant City of Charlotte to dismiss the Complaint pursuant to Rule 12(b)(6), for Judgment on the Pleadings pursuant to Rule 12(c), and for Summary Judgment pursuant to Rule 56 of the North Carolina Rules of Civil Procedure; motions of Defendant Norfolk Southern Railway Company to dismiss Count 9 of the Complaint for lack of subject matter

jurisdiction pursuant to Rule 12(b)(1), to dismiss the Complaint pursuant to Rule 12(b)(6), for leave to amend its answer and counterclaim pursuant to Rule 15, and for Summary Judgment pursuant to Rule 56 of the North Carolina Rules of Civil Procedure; and on motions of the Plaintiff to dismiss the counterclaim of Defendant Norfolk Southern pursuant to Rule 12(b)(6), and to continue the hearing on Defendants' motions for Summary Judgment.

The Court DENIED Plaintiff's motions to continue hearing of the Summary Judgment motions. Plaintiff made exception in open court, and the parties agreed and the Court allowed that the hearing could continue without waiving Plaintiff's exception and objection.

The Court reviewed the record and considered the briefs submitted and arguments made by counsel. Based on the foregoing, it appears to the Court that there is a genuine issue of one or more material facts as to Counts 1, 3, 6 and 7 of the Complaint and that Defendants are not entitled to judgment as a matter of law on those Counts. It further appears to the Court that no genuine issue of any material fact exists as to Counts 2, 4, 5 and 8 of the Complaint and the Defendants are entitled to judgment as a matter of law on those counts.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the motions of Defendants City of Charlotte and Norfolk Southern Railway Company for Summary Judgment on Counts 1, 3, 6 and 7 of the Complaint are hereby DENIED and the motions of said Defendants for Summary Judgment on Counts 2, 4, 5 and 8 of the Complaint are hereby ALLOWED. Count 9 of the Complaint was

voluntarily dismissed with prejudice by Plaintiff prior to the hearing.

IT IS FURTHER ORDERED that in light of the Court's ruling on Defendant's Summary Judgment motions, Defendants' motions to dismiss Complaint pursuant to Rule 12(b)(6) and Defendant City of Charlotte's motion for judgment on the pleadings pursuant to Rule 12(c) are DENIED.

IT IS FURTHER ORDERED that Defendant Norfolk Southern's motion to dismiss pursuant to Rule 12(b)(1) is DENIED.

IT IS FURTHER ORDERED that the motion of Defendant Norfolk Southern Railway Company for leave to amend its Answer and Counterclaim is DENIED.

IT IS FURTHER ORDERED that the motion of Plaintiff North Carolina Railroad Company to dismiss Counterclaim of Norfolk Southern Railway Company is DENIED. Plaintiff is allowed twenty days from the date of the entry of this Order to file a reply to the counterclaim.

The parties have agreed that Defendants shall have 30 days after the entry of this Order to serve their responses or objections to Plaintiff's discovery requests.

The parties consent to this Order being executed by the undersigned Judge out of session and out of term.

This the 19th day of May, 1992.

s/ Claude S. Sitton
Honorable Claude S. Sitton
Superior Court Judge Presiding

APPENDIX D

INTERSTATE COMMERCE COMMISSION

NOTICE OF EXEMPTION

[Docket No. AB-290 (Sub-No. 118X)]

NORFOLK SOUTHERN RAILWAY COMPANY--
ABANDONMENT EXEMPTION--
IN MECKLENBURG, COUNTY, NC

Decided: July 16, 1991

Applicant has filed a notice of exemption under 49 CFR 1152 Subpart F--Exempt Abandonments to abandon its 0.13-mile line of railroad between milepost R-0.0, at 2nd Street, and milepost R-0.13, at Stonewall Street, in Charlotte, Mecklenburg County, NC.

Applicant has certified that: (1) no local traffic has moved over the line for at least 2 years; (2) any overhead traffic on the line can be rerouted over other lines; and (3) no formal complaint filed by a user of rail service on the line (or a State or local government entity acting on behalf of such user) regarding cessation of service over the line either is pending with the Commission or with any U.S. District Court or has been decided in favor of the complainant within the 2-year period. The appropriate State agency has been notified in writing at least 10 days prior to the filing of this notice.

As a condition to use of this exemption, any employee affected by the abandonment shall be protected under Oregon Short Line R. Co.--Abandonment--Goshen, 360 I.C.C. 91 (1979). To address whether this condition adequately protects affected employees, a petition for partial revocation under 49 U.S.C. 10505(d) must be filed.

Provided no formal expression of intent to file an offer of financial assistance has been received, this exemption will be effective on August 30, 1991 (unless stayed pending reconsideration). Petitions to stay that do not involve environmental issues,[2] formal expressions of intent to file an offer of financial assistance under 49 CFR 1152.27(c)(2),[3] and trail use/rail banking statements under 49 CFR 1152.29 must be filed by August 12, 1991.[4] Petitions for reconsideration

---

[2]A stay will be routinely issued by the Commission in those proceedings where an informed decision on environmental issues (whether raised by a party or by the Section of Energy and Environment in its independent investigation) cannot be made prior to the effective date of the notice of exemption. See Exemption of Out-of-Service Rail Lines, 5 I.C.C.2d 377 (1989). Any entity seeking a stay involving environmental concerns is encouraged to file its request as soon as possible in order to permit this Commission to review and act on the request before the effective date of this exemption.

[3]See Exempt. of Rail Abandonment--Offers of Finan. Assist., 4 I.C.C.2d 164 (1987).

[4]The Commission will accept a late-filed trail use statement so long as it retains jurisdiction to do so.

or requests for public use conditions under 49 CFR 1152.28 must be filed by August 20, 1991, with:

Office of the Secretary
Case Control Branch
Interstate Commerce Commission
Washington, DC 20423

A copy of any petition filed with the Commission should be sent to applicant's representative:

Robert J. Cooney
Three Commercial Place
Norfolk, VA 23510

If the notice of exemption contains false or misleading information, use of the exemption is void ab initio.

Applicant has filed an environmental report which addresses environmental or energy impacts, if any, from this abandonment.

The Section of Energy and Environment (SEE) will prepare an environmental assessment (EA). SEE will issue the EA by August 5, 1991. Interested persons may obtain a copy of the EA from SEE by writing to it (Room 3219, Interstate Commerce Commission, Washington, DC 20423) or by calling Elaine Kaiser, Chief, SEE at (202) 275-7684. Comments on environmental and energy concerns must be filed within 15 days after the EA becomes available to the public.

Environmental, public use, or trail use/rail banking conditions will be imposed, where appropriate, in a subsequent decision.

Decided: July 16, 1991

By the Commission, David M. Konschnik, Director, Office of Proceedings.

Sidney L. Strickland, Jr.
Secretary

(SEAL)

APPENDIX E

INTERSTATE COMMERCE COMMISSION

DECISION

[Docket No. AB-290 (Sub-No. 118X)]

NORFOLK SOUTHERN RAILWAY COMPANY--
ABANDONMENT EXEMPTION--
IN MECKLENBURG, COUNTY, NC

Decided: February 18, 1992

On July 11, 1991, the Norfolk Southern Railway Company (NS), filed a notice of exemption under 49 CFR 1152 Subpart F--Exempt Abandonments to abandon a 0.13-mile line of railroad between milepost R-0.0, at 2nd Street, and milepost R-0.13, at Stonewall Street, in Charlotte, Mecklenburg County, NC. On July 31, 1991, the notice of exemption was served and published in the Federal Register (56 Fed. Reg. 36,169). The exemption became effective on August 30, 1991.

On December 11, 1991, the North Carolina Railroad Company (NCRR) filed a petition seeing to void, reopen, or revoke the notice of exemption. NS replied on December 20, 1991, and the City of Charlotte (City) filed a verified statement supporting NS on January 13, 1991. On December 30, 1991, NCRR filed a letter-response. We will deny the petition.

DISCUSSION AND CONCLUSIONS

In its petition, NCRR argues that the notice of exemption is void ab initio because it contained false and misleading information, or that it should be reopened due to substantially changed circumstances and revoked pursuant to 49 U.S.C. 10327(g)(1) and 49 U.S.C. 10505(d). Under 49 U.S.C. 10327(g)(1), we may reopen a proceeding when we find substantially changed circumstances, and under 49 U.S.C. 10505(d), we may revoke an exemption when we find that application of a provision of the Interstate Commerce Act (Act) is necessary to carry out the national rail transportation policy (RTP) in 49 U.S.C. 10101a. The party seeking to revoke an exemption has the burden of showing that the revocation criterion of 49 U.S.C. 10505(d) has been met.

We are required to exempt a person, class of persons, or a transaction or service when we find that applying a regulatory provision of the Act is not necessary to carry out the RTP and either the transaction or service is of limited scope, or regulation under the Act is not necessary to protect shippers from the abuse of market power (49 U.S.C. 10505(a)). Pursuant to this authority, we have adopted a class exemption procedure for abandonment of rail lines that, without formal complaint, have not been used for local service for 2 or more years, provided that any overhead traffic on the line can be rerouted (49 CFR 1152.50(b)). If the notice contains false or misleading information, the exemption is void ab initio. NS has met these requirements to qualify for the 2-year out-of-service class exemption for the line in issue here.

NCRR has based its "void ab initio" claim on an article from the December 2, 1991, issue of The Charlotte

Observer (attached as Exhibit No. 1 to its petition), whose author opined that the Stonewall Street Bridge, embraced within the line abandoned, probably was more than 50 years old. NCRR claims that NS failed to bring this bridge, with potential historic significance, to the attention of the Commission's Section of Energy and Environment and the North Carolina Historic Preservation Office as required by 49 CFR 1105.8. Because of this omission, NCRR asserts that the exemption notice is void ab initio, since it contained false or misleading information.

In a letter from NCRR's Legal Counsel filed on December 30, 1991, NCRR has now admitted that its petition is in error on this point. According to the letter, the Stonewall Street Bridge is less than 50 years old and is ineligible for inclusion in the Register of Historic Places. Consequently, we find that the exemption notice is not void ab initio for containing false or misleading information.

In the alternative, NCRR requests reopening of the proceeding because of substantially changed circumstances. NCRR explains that it has leased its rail property to NS under a long term lease but that lease is due to expire in 1994. NCRR would like to preserve the option of itself resuming rail service at that time or engaging another operator and is interested in preserving access to NS across the Stonewall Street Bridge. However, NCRR claims that prior statements made by the City that it would preserve rail corridors, especially including this one, eliminated the need at the time the notice was published for NCRR or other interested persons to make an offer to purchase the subject line or to seek imposition of a public use condition; allowing 6-months time to negotiate acquisition of the right-of-way. NCRR claims that the City's subsequent decision to effectively

destroy the rail corridor by tearing down the Stonewall Street Bridge, after purchasing the right-of-way as part of its plans to build a convention center, has created substantially changed circumstances from its commitment to preserve rail corridors. NCRR adds that the City's purchase of the right-of-way is subject to all outstanding leases, including the one between NCRR and Southern Railway Company (SRC), a corporate predecessor to NS, dated June 16, 1969, requiring that SRC "form and maintain a continuous through track connection" with NCRR. NCRR concludes that the Commission should reopen the proceeding, nullify the exemption authority, and afford interested persons the opportunity to make an offer to purchase the property or to seek a public use condition.

In support of its claim of changed circumstances, NCRR relies on four documents submitted as exhibits to its petition: (1) a letter from City Mayor Sue Myrick to NCRR President E. Stephen Stroud; (2) the executive summary from Charlotte 2005 Transportation Plan: Transit Corridors Study (June 1989) (hereinafter Executive Summary); (3) a Memorandum of Lease between NCRR and SRC dated June 16, 1969; and (4) a lease between NCRR and SRC, dated August 16, 1895, which the Memorandum of Lease amended. Our review of these documents does not support a claim that the City made a commitment or assumed any obligation that can be used as a basis for finding changed circumstances.

Though the City stated that it was "interested in rail corridor preservation for future urban rail service" (letter from Mayor Myrick to NCRR President Stroud) neither that statement nor any other part of the letter commits the City to act to preserve rail corridors. We do not find a "commitment" to preserve rail corridors from a part of one sentence in a cover letter transmitting a copy of an Executive

Summary of a study on public transportation alternatives (including light rail) to relieve the City's overloaded highway system. The Executive Summary also contains no language that could be interpreted as a commitment by the City to preserve rail corridors. Moreover, the City points out that it met with NCRR officials as early as October 1990 and explained that the City proposed to protect the subject rail corridor for possible light rail use — not for heavy or freight rail use. The notice of exemption filed by NS supports the City, stating that the City's plans for the Convention Center also provided for "preservation of a rail corridor over or paralleling the existing right of way for possible light rail or trolley use."

We find also that neither NS nor the City assumed any obligation under the terms of the Memorandum of Lease, to maintain a connection with NCRR over the abandoned line. Our reading of the memorandum shows that it deals only with NCRR property and that NS was only obligated to determine a point of connection for a right-of-way so that NCRR could connect with NS. NS did not obligate itself to connect with NCRR or to maintain a right-of-way. NCRR's misinterpretation of the Memorandum of Lease does not provide a basis for establishing changed circumstances to reopen the proceeding.

Moreover, we find that NCRR has failed to show that revocation of the abandonment exemption here is necessary to carry out the RTP. Relevant RTP factors include: (1) minimizing the need for Federal regulatory control over railroads (49 U.S.C. 10101a(2)); (2) promoting a safe and efficient rail transportation system by allowing rail carriers to earn adequate revenues (49 U.S.C. 10101a(3)); (3) fostering sound economic conditions in transportation (49 U.S.C.

10101a(5)); (4) reducing regulatory barriers to exit the industry (49 U.S.C. 10101a(7)); and (5) encouraging honest and efficient management of railroads (49 U.S.C. 10101a(10)). It would be inconsistent with these policies here to revoke the abandonment exemption granted under our out-of-service rules promulgated in full consideration of the RTP. NCRR has stated that it would like to preserve the option of resuming service on the line upon the 1994 expiration of its long-term lease with NS to operate the line, and that it would then be interested in connecting with NS across the Stonewall Street Bridge. However, if NCRR were to resume service, it could still connect with NS north of Charlotte at milepost 375.5 on the Charlotte-Greensboro line where it connect presently with NS. Thus regulation of the abandonment is not needed for the preservation of future rail service by NCRR or another operator. Accordingly, we will deny NCRR's petition.

This action will not significantly affect either the quality of the human environment of the conservation of energy resources.

It is ordered:

1. NCRR's petition is denied.

2. This decision is effective on February 24, 1992.

By the Commission, David M. Konschnik, Director, Office of Proceedings.

Sidney L. Strickland, Jr.
Secretary

(SEAL)

APPENDIX F

STATE OF NORTH CAROLINA
COUNTY OF MECKLENBURG

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
91 CvS 17226

THE NORTH CAROLINA RAILROAD COMPANY,
Plaintiff,

v.

CITY OF CHARLOTTE and NORFOLK
SOUTHERN RAILWAY COMPANY,
Defendants.

COMPLAINT FOR DECLARATORY JUDGMENT

. . . .

5. NCRR owns a continuous railroad line and corridor, approximating 316 miles in length, across the State of North Carolina from the City of Charlotte to Morehead City, North Carolina ("NCRR's railroad line" or "NCRR's line").

6. The southern terminus of NCRR's railroad line is located in downtown Charlotte at its railroad line's

intersection with the southern right of way line of Second Street. ("NCRR's southern terminus").

7. NCRR's railroad line connects with a railroad line owned by defendant NS at NCRR's southern terminus. NS' line continues south from that point through the remainder of Charlotte and to points beyond as an interstate railroad line ("NS railroad line" or "NS line").

8. For many years, NS utilized NCRR's line through downtown Charlotte pursuant to leases between NS and NCRR. NS used its own railroad line and NCRR line which connects thereto for all types of traditional railroad uses.

9. Prior to 1969 NCRR and NS jointly owned that certain lot or parcel of land located on the southern side of East Second Street immediately adjoining the NCRR's southern terminus which is identified as Lot A on Exhibit A hereto. The joint railroad line ran through Lot A.

10. On December 31, 1968 NCRR and NS executed a new Lease Agreement covering that portion of NCRR's railroad line and related property located between NCRR's southern terminus at East Second Street and Trade Street in Charlotte. . . . .

11. The 1968 Lease expressly excepted and reserved from its terms a 40 foot wide right of way ("40 foot strip") for two railroad tracks to be located:

> such that the track or tracks to be included therein can be connected with track on land now leased by Lessee [NS] from Lessor [NCRR] under said 1895 Lease at Trade Street

on the northeast and track on land owned by Lessee on the southwest so as to form and maintain a continuous through track connection ..... [emphasis added]

. . . .

14. In 1972 NS filed of record a plat depicting the 40 foot strip as connecting with the railroad line and the then existing railroad right of way over the Subject property ("Right of Way") running from NCRR's southern terminus, over lot A and continuing southerly to and across the remainder of the Subject Property, the Right of Way and East Stonewall Street.

. . . .

17. On or about November 29, 1990, NS entered into a contract ("Contract") to sell to the City a parcel of property located between East Stonewall Street and East Second Street (the "Subject Property") . . . .

. . . .

Count One

. . . .

39. NCRR has an easement implied by reservation based on pre-existing use over, across and through Lot A.

Count Two

. . . .

41. NCRR has an express easement over, across and through the Subject Property.

Count Three

. . . .

43. The Subject Property is encumbered by an equitable servitude in the nature of a railroad right of way so as to provide a continuous through connection between NCRR's line and NS's line.

Count Four

. . . .

45. The Subject Property is encumbered by a restrictive covenant or negative easement prohibiting any use which is inconsistent with a continuous through track connection between NCRR's line and NS' line.

Count Five

. . . .

47. NCRR has an express contractual agreement with NS to keep and maintain a continuous through track connection between NCRR's line and NS' line.

Count Six

. . . .

49. Alternatively, NCRR has an implied contract with NS whereby NS agreed to maintain a continuous through track connection between NCRR's line and NS's line.

Count Seven

. . . .

51. NCRR has an implied contract with the City of Charlotte whereby the City is required to maintain the existing railroad corridor or a like corridor.

Count Eight

. . . .

53. NCRR, as a third party beneficiary of the Contract between the City and NS, has a contractual right to require the Contract to be performed according to its terms based on failure of consideration for the Amendment.

Count Nine

. . . .

55. NCRR has a property interest and right created under federal law to seek to offer to purchase, to finance operations on, to seek public use conditions on, or to otherwise limit or prohibit the attempted abandonment of the NS line.

56. As stated above, there exists among the parties an actual, genuine and existing controversy as to their respective rights concerning the Subject Property. NCRR is entitled to a declaration of its aforesaid right, title or interest and to an order, pursuant to N.C.G.S. § 1-259, protecting the same from any interference with said right, title or interest by defendants.

WHEREFORE plaintiff prays:

(a) That the Court declare plaintiff's right, title and interest in Lot A, the Subject Property, the Right of Way, and the Norfolk Southern railroad line and enter an order protecting the same from any interference by defendants; . . . .

* * * * *

APPENDIX G

STATE OF NORTH CAROLINA
COUNTY OF MECKLENBURG

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
91 CvS 17226

THE NORTH CAROLINA RAILROAD COMPANY,
Plaintiff,

v.

CITY OF CHARLOTTE and NORFOLK
SOUTHERN RAILWAY COMPANY,
Defendants.

TRANSCRIPT OF MOTIONS
HEARING ON MAY 2 [*sic*], 1992

THIS CAUSE coming on to be heard and being heard before the Hon. Claude S. Sitton, Judge Presiding on the 2nd [*sic*] day of May, 1992 at a regularly scheduled session of Superior Court of Mecklenburg County, for the hearing of Motions, the following proceedings were had, to-wit:

. . . .

MR. McLENDON: . . . In the Summer of 1991 a petition was filed with the I.C.C. to approve the abandonment of that short piece of track on the .55 acres which the I.C.C. approve [*sic*]. Sometime later, specifically I believe the date was December the 10th, as I recall, '91, North Carolina Railroad Company filed a Lawsuit and simultaneously filed a petition with the I.C.C. to re-open the abandonment proceeding before the I.C.C. alleging that North Carolina Railroad had some Right over that .55 acreage [*sic*] and alleging that they had a contractual obligation with this new right-of-way to tie into the old Norfolk & Southern Railway down at Second Street. Now, the I.C.C. considered that petition and in a fairly lengthy denial of that petition specifically said that there was no such agreement at all and that the location of the right-of-way between Trade Street and Second Street established no Right in North Carolina Railroad at all and that the abandonment was conclusive and final.

. . . . There was no obligation on Southern Railway to continue that connection anymore [*sic*] than it is to continue the connection from Salisbury to Atlanta or Danville to Greensboro. That can be withdrawn with I.C.C. approval at any time. . . . .

MR. SAINTSING: . . . I'll just point out that it is clear from Federal Law, there's no shades of gray here, abandonments are issues to be decided exclusively by the Interstate Commerce Commission, that is exclusive full jurisdiction and it pre-empts any declaration of Rights as [*sic*] regard to abandonment by any other Court. That applies even if a Plaintiff is attempting not to re-litigate an abandonment as such but is attempting in some way to re-litigate the issues of a requirement that an interstate carrier provide either service or rails. That's the only reason Norfolk/Southern is

a Defendant in this case. Norfolk/Southern has no property interest in the Lot A or the subject property, that's been conveyed to the City in abandonment and the tracks are gone. The only basis for attempting Norfolk/Southern in here, in this case is these five or six words taken out of context from the memory [*sic*] of the Lease. The Interstate Commerce Commission explicitly ruled that to take those words out of context would be a misinterpretation. Norfolk/Southern was entitled to abandon the track. That's the final word on the issue. Norfolk/Southern is out of the property and, Judge, should be out of this Lawsuit. Thank you.

* * * * *

APPENDIX H

49 U.S.C. § 10501

Section 10501 of Title 49, United States Code, provides, in part:

(a) Subject to this chapter and other law, the Interstate Commerce Commission has jurisdiction over transportation—

> (1) by rail carrier, express carrier, sleeping car carrier, water common carrier, and pipeline carrier that is—
>
> > (A) only by railroad;
> >
> > . . . and
>
> (2) to the extent such jurisdiction is not limited by subsection (b) of this section or the extent the transportation is in the United States and is between a place in—
>
> > (A) a State and a place in another State;
> >
> > . . . .

(b) The Commission does not have jurisdiction under subsection (a) of this section over—

> (1) the transportation of passengers or property, or the receipt, delivery, storage, or handling of property, entirely in a State (other than the District of Columbia) and not

> transported between a place in the United States and a place in a foreign country except as otherwise provided in this subtitle . . . .

(c) This subtitle does not affect the power of a State, in exercising its police power, to require reasonable intrastate transportation by carriers providing transportation subject to the jurisdiction of the Commission under this subchapter unless (1) the transportation is deemed to be subject to the jurisdiction of the Commission pursuant to section 11501(b)(4)(B) of this title, or (2) the State requirement is inconsistent with an order of the Commission issued under this subtitle or is prohibited under this subtitle.

(d) The jurisdiction of the Commission and of State authorities (to the extent such authorities are authorized to administer the standards and procedures of this title pursuant to this section and section 11501(b) of this title) over transportation by rail carriers, and the remedies provided in this title with the respect to the rates, classifications, rules, and practices of such carriers, is exclusive.

* * * * *

49 U.S.C. § 10901(a)

Section 10901(a) of Title 49 of the United States Codes provides, in part:

(a) A rail carrier providing transportation subject to the jurisdiction of the Interstate Commerce Commission under subchapter I of chapter 105 of this title may—

(1) construct an extension to any of its railroad lines;

(2) construct an additional railroad line;

(3) acquire or operate an extended or additional railroad line; or

(4) provide transportation over, or by means of, an extended or additional railroad line;

only if the Commission finds that the present or future public convenience and necessity require or permit the construction or acquisition (or both) and operation of the railroad line.

* * * * *

49 U.S.C. § 10903

Section 10903 of Title 49 of the United States Code provides, in part:

(a) A rail carrier providing transportation subject to the jurisdiction of the Interstate Commerce Commission under subchapter I of chapter 105 of this title may—

(1) abandon any part of its railroad lines; or

(2) discontinue the operation of all rail transportation over any part of its railroad lines;

only if the Commission finds that the present or future public convenience and necessity require or permit the abandonment or discontinuance.

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